Balachandran s/o Samy & Anor v Chew Man Chan & Anor

HIGH COURT (PENANG) — CIVIL APPEAL NO 12-117-93
VINCENT NG J
8 AUGUST 1995

Civil Law Act *— Damages — Fatal accident — Dependency claim — Whether proportionate reduction in damages awarded should be made for contributory negligence on the part of the deceased — Whether estate of deceased should be made party to proceedings — Civil Law Act 1956 ss 7, 8 & 12(4)*

The deceased, a minor, died in a motor accident and his parents (the respondents) sued the appellants for bereavement and funeral expenses. As neither grant of probate nor letters of administration had been obtained in respect of the estate of the deceased, the respondents were suing in their personal capacities as dependants. The appellants pleaded contributory negligence on the part of the deceased. The sessions court found the appellants and the deceased equally to blame but, ordered the appellants to pay full damages since the estate of the deceased was not party to the proceedings. The appellants appealed and contended that by virtue of s 12(4) of the Civil Law Act 1956 ('the 1956 Act') proportionate reduction should be made in the damages awarded even where the person liable for contributory negligence was not a party to the proceedings. The respondents argued that s 12(4) was a provision of substantive law and that the compliance of rules of procedure was necessary where the defendants alleged contributory negligence against a person who was not a party to the proceedings.

Held, dismissing the appeal:

Section 12(4) of the 1956 Act is merely a provision of substantive law that gives that court power and jurisdiction to reduce damages proportionate to any contributory negligence on the part of the deceased. It is not intended to override the established procedural law in respect of reduction of damages on account of contributory negligence. Thus, only when relevant procedural law had been complied with can the court be moved to invoke the power to reduce damages. The estate of the deceased should be made a party to the proceedings to enable the court to adjudicate on the question of contributory negligence and the personal representatives of the estate should be given an opportunity to be heard before the court proceeds to reduce any damages awarded.

[Bahasa Malaysia summary

Si mati, seorang di bawah umur, meninggal dunia dalam satu kemalangan dan ibu bapanya (penentang-penentang) menyaman perayu-perayu untuk kehilangan (bereavement) dan perbelanjaan

pengkebumian. Oleh kerana tiada probet atau surat kuasa mentadbir diperolehi berkenaan dengan estet si mati, penentang-penentang menyaman dalam keupayaan persendirian sebagai tanggungan. Perayu-perayu memplid kecuaian sertaan oleh si mati. Mahkamah sesyen mendapati bahawa perayu-perayu dan si mati adalah sama-sama bersalah, tetapi memerintahkan perayu-perayu untuk membayar ganti rugi penuh kerana estet si mati bukan pihak dalam prosiding. Perayu-perayu merayu dan menegaskan bahawa memandangkan kepada s 12(4) Akta Undang-Undang Sivil 1956 ('Akta 1956 tersebut') pengurangan bersekadar hendaklah dibuat dalam award ganti rugi walaupun orang yang bertanggung jawab menyebabkan kecuaian sertaan bukan pihak kepada prosiding. Penentang-penentang menghujahkan bahawa s 12(4) adalah peruntukan undang-undang substantif dan bahawa kepatuhan kepada kaedah-kaedah prosedur adalah perlu di mana defendan-defendan mendakwa kecuaian sertaan terhadap seorang yang bukan pihak kepada prosiding.

Diputuskan, menolak rayuan:

Seksyen 12(4) Akta 1956 tersebut hanya satu peruntukan undang-undang substantif yang memberikan kuasa dan bidang kuasa kepada mahkamah untuk mengurangkan ganti rugi sekadar dengan apa-apa kecuaian sertaan oleh si mati. Ianya bukan bertujuan untuk mengatasi undang-undang prosedur yang telah mantap berkenaan dengan pengurangan ganti rugi atas sebab kecuaian sertaan. Oleh itu, hanya apabila undang-undang prosedur yang relevan dipatuhi barulah mahkamah boleh diminta untuk menggunakan kuasa untuk mengurangkan ganti rugi. Estet si mati patut dijadikan pihak kepada prosiding untuk membolehkan mahkamah memutuskan atas persoalan kecuaian sertaan dan wakil diri estet patut diberi peluang untuk didengar sebelum mahkamah meneruskan untuk mengurangkan apa-apa award ganti rugi.]

Notes

For cases on damages (fatal accident), see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2211–2257; [1995] *Mallal's Digest* 82–83.

Cases referred to

Lim Chai Oon & Anor v Normah bte Ismail [1994] 2 AMR 1679 (not folld)

Maimunah bte Hassan (sebagai wakil Harta Pusaka Rozita bte Khamis) & Satu Lagi lwn Marimuthu a/l Samanathan & Satu Lagi [1993] 1 CLJ 119 (folld)

Mallet & Anor v Dunn [1942] 2 KB 180, [1949] 1 All ER 973 (refd)

Maxifiled v Llewellyn [1961] 3 All ER 95, [1961] 1 WLR 1119 (refd)

Pacific Centre Sdn Bhd v United Engineers (M) Sdn Bhd [1984] 2 CLJ 56 (refd)

Veronica Joseph (F), an Infant & Anor (by Cyril Augustus Joseph, their Next Friend) v Tu Kon Lin & Anor [1987] 1 CLJ 81

Legislation referred to

Civil Law Act 1956 ss 7, 8, 10, 12

Rules of the High Court 1980 O 15 rr 6(2), (6), 6A

Vincent Ng J: This was an appeal to the High Court from the decision of the sessions court over a case arising out of a road accident. The brief facts are as follows. Chew Chin Tiong, a minor, ('the deceased') died in a motor accident and his parents (the respondents) sued the appellants for bereavement and funeral expenses. It is understood that no grant of probate or letters of administration were obtained in respect of the estate of the deceased and by virtue of s 7(8) of the Civil Law Act 1956 (the 1956 Act) the respondents are now suing in their personal capacities as dependants. The appellants pleaded contributory negligence on the part of the deceased and after a full hearing, the learned sessions judge found that the appellants and the deceased were equally to be blamed. However, since the estate of the deceased was not made a party the learned sessions judge ordered the appellants to pay full damages based on the authority of the case of *Veronica Joseph F, an Infant & Anor (by Cyril Augustus Joseph, their Next Friend) v Tu Kon Lin & Anor* [1987] 1 CLJ 81. At that time, the *Veronica* case was the only reported case on point and therefore no doubt, the learned sessions judge rightly thought that he was bound by the decision in that case. The only issue of law in the appeal before me was whether or not proportionate reduction can be made in the damages awarded to the claimant under s 12(4) of the 1956 Act where the person liable for contributory negligence (or his estate if he had died) is not a party to the proceedings.

Section 7(8) of the 1956 Act reads as follows:

> If there is no executor of the person deceased or there being an executor no action as in this section mentioned has, within six calendar months after the death of the person deceased, been brought by the executor, the action may be brought by all or any of the persons, if more than one, for whose benefit the action would have been brought if it had been brought by the executor, and every action so to be brought shall be for the benefit of the same person or persons and shall be subject to the same procedure as nearly as may be if it was brought by the executor.

Mr Palaniappan, counsel for appellants exhorted the court to answer the issue in the affirmative as he contended that s 12(4) of the 1956 Act clearly provided that any damages awarded to the dependants under s 7 of the 1956 Act should be reduced proportionately to the extent of the deceased's liability in an accident.

Section 12(4) stipulated as follows:

> Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action

> were brought for the benefit of the estate under section 8, the damages recoverable would be reduced under subsection (1), any damages recoverable in any action brought for the benefit of the dependants of that person under section 7 or for the benefit of the husband of that person under proviso (iii) of subsection (3) of section 7 or of the spouse or parents under subsection (3B) of section 7 shall be reduced to a proportionate extent.

Therefore, he submitted, s 12(4) equally applied to actions under ss 7 and 8 of the 1956 Act.

In the *Veronica* case, the learned Wan Yahya J (as he then was) addressed his mind to the issue and held (at p 88) that the plaintiffs therein were not persons suffering damages 'as a result partly of their own fault' within the meaning of s 12(4) the 1956 Act. He referred to the English cases of *Mallet & Anor v Dunn* [1949] 1 All ER 973 and *Maxfield v Llewellyn* [1961] 1 WLR 1119. In the latter case Ormerod LJ pronounced (at p 1122):

> It appears to me that the court must have regard to a person's responsibility for the damage having regard to the parties who are before the court, whose share of the damage can be taken into account and who have the opportunity of putting arguments for and against their share of blame and generally of being heard in the action.

Wan Yahya J (at p 86) had this to say on the operation of s 12(4) of the 1956 Act:

> I agree with Counsel that benefit to the dependants can be reduced to proportionate extent but will only apply where the action was brought 'for the benefit of the estate under s 8 of the Act' and not as in the present case under s 7. This section will not relieve the Defendant from joining the administrator of the estate as a party if he wishes to establish contributory negligence on the part of the deceased.

Consequently, the court in the *Veronica* case ordered the defendants to pay the full damages as the estate of the deceased was not made a party to the proceedings.

The second case on point, was *Maimunah bte Hassan (sebagai wakil Harta Pusaka Rozita bte Khamis) & Satu Lagi lwn Marimuthu s/o Samanathan & satu lagi* [1993] 1 CLJ 119, the learned judge did not cite the *Veronica* case but observed that the estate of the deceased was not a party and awarded full damages.

However, 1994 saw a conflicting decision in the case of *Lim Chai Oon & Anor v Normah bte Ismail* [1994] 2 AMR 1679, wherein the learned judge disagreed with the ratio in the *Veronica* case, as he was of the view that s 12(4) the 1956 Act was sufficiently clear and unambiguous to allow the court to make a reduction in the claim for damages made under ss 7 and 8 the 1956 Act. Further, he saw no purpose being served by having to bring in the deceased estate as a party as virtually in all cases of this nature, the beneficiaries of the estate consist of the same set of people as the dependency claimants. The learned judge foresaw a multiplicity of suits if the *Veronica* case was followed. I agree that

A s 12(4) is clear and unambiguous, but only to the extent of substantive law.

It was Mr N Shanmugam's, counsel for respondents', submission in the appeal before me that the learned judge in *Lim Chai Oon* had failed to appreciate that s 12(4) is a provision of substantive law and B that the compliance of rules of procedure, which are also statutory in nature, are necessary where the defendant alleges contributory negligence on the part of a person who is not a party before the court. It is also to be noted that s 10(1)(c) of the 1956 Act provides that where damage is suffered as a result of a tort any tort-feasor may recover contribution from any other tortfeasor. And, s 12(3) provides that s 10 shall apply in C any case where two or more persons are liable.

I am inclined to accept the ratio decidendi in the *Veronica* case as I agree with Mr Shanmugam that s 12(4) the 1956 Act is merely a provision of substantive law that gives power and jurisdiction to the court to reduce the damages proportionate to any contributory negligence D on the part of the deceased. And, it is only when relevant procedural law had been complied with, eg O 15 r 6(2)(b) or O 15 r 6A of the Rules of the High Court 1980, that the court can be moved to invoke the power to reduce the damages.

It is essential to read the 1956 Act in its entirety; and s 12(4) E ought to be read in the light, particularly, of ss 7, 8, 10 and 12(3) of the 1956 Act in order to determine the true intention of the legislature. Upon careful reading of such provisions I do not think that the legislature had intended by implication in s 12(4) to override the established procedural law in respect of reduction of damages on account of contributory negligence. It stands to reason that the estate of the F deceased should be a party before the court to enable the court to adjudicate on the question of contributory negligence, whereby this issue itself could be pointedly tried, and the personal representatives of the estate (who may or may not be the dependants of the deceased) given the opportunity to be heard, before the court proceeds to reduce G the damages awarded to the plaintiffs.

Finally, I cannot agree that because the beneficiaries of the estate may consist of the same set of people as the dependency claimants, the estate of the deceased need not be made a party to the suit. The practical effect of this approach would be to ignore the established system of substantive law as distinct from procedural law in our statute H books. It would defeat the purpose of having procedural laws, which were meant to have statutory force and are not mere rules of practice. (See the decision of Edgar Joseph Jr J (as he then was) in *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Sdn Bhd* [1984] 2 CLJ 56.)

To conclude, my view is that unless it is clearly expressed in I s 12(4) the 1956 Act or in any other statutory provision to the effect that the deceased's estate need not be made a party in an action under s 7 of the 1956 Act, the court should not brush aside the abiding dichotomy between substantive law and procedural law. It should be strictly maintained, as substantive law bestows rights to a person whereas

procedural law determines the mode in which he should move the court in order to enforce such rights. This is indeed the very essence and core basis of our jurisprudence and there is no compelling reason for me to take a novel approach against this established of our law.

Consequently, for the above reasons, I dismiss the appeal with costs.

Appeal dismissed with costs.

Reported by Zahid Taib